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November 11, 2021

BY ECF

The Honorable Norman K. Moon
United States District Court
Western District of Virginia
255 West Main Street
Charlottesville, VA 22902

Re: Sines et al. v. Kessler et al., No. 3:17-cv-00072 (NKM) (JCH)

Dear Judge Moon:

We write to clarify the record with respect to certain statements made about Plaintiff Seth Wispelwey's testimony during yesterday's proceedings. In particular, the Court made evidentiary rulings and statements suggesting that Reverend Wispelwey's earlier testimony yesterday about "antifa" served as a proper foundation for the understanding of Defendant Nathan Damigo (who testified subsequent to Reverend Wispelwey) concerning what "antifa" is, how it can be identified, and whether it is a violent organization. The Court's statements—if left uncorrected—will likely confuse the jury and prejudice Plaintiffs. As Reverend Wispelwey testified, in August 2017, he understood the term "antifa" to be "a catchall for counter-protestors." Reverend Wispelwey's testimony about "antifa" thus cannot serve as the foundation for Mr. Damigo's separate understanding of that term, which was definitely very different from a "catchall for counter protestors" as a whole. We therefore respectfully request that the Court issue the proposed curative instruction attached as Exhibit A.

Reverend Wispelwey's Testimony

Reverend Wispelwey testified that he was not a member of any organization called "antifa." On direct examination, he testified that at the relevant time, he had not heard of the term "antifa," Nov. 10 Trial Tr. 67:25-68:2, and had not been "in contact with anyone [he] understood to be a member of Antifa," *id.* at 67:22-24. He testified that, when he used the term "antifa" in an exhibit, he understood it to be "a catchall for counter-protestors who [he] didn't know, who didn't seem to have affiliations" and that were not "branded like the Unite the Right attendees." *Id.* at 68:12-16.

During cross-examination, Reverend Wispelwey testified that he does not “know anyone who identifies as Antifa,” *id.* at 102:7-12, that at the time of Unite the Right, “Antifa was just a catchall term for counter-protestors,” *id.* at 116:22-23, and that he does not “know what Antifa does,” *id.* at 128:24. Reverend Wispelwey testified that when he had made previous statements about “antifa,” he had been “working with [his] limited understanding of the meaning of the word ‘Antifa.’” *Id.* at 124:9-12.

Later during the proceedings, Defendant Nathan Damigo testified that he “noticed a lot of very identifiable symbols with organizations that would typically be considered Antifa.” *Id.* at 232:2-4. Plaintiffs’ counsel objected to that testimony on the ground that Mr. Damigo lacked the requisite foundation to testify “about something being typically considered Antifa.” *Id.* at 232:5-7. In overruling that objection, the Court stated the following:

Well, the minister said he talked about Antifa being there. He apparently recognized them.

Id. at 232:11-12 (emphasis added). A few moments later, Defendant Christopher Cantwell asked Mr. Damigo, “Is race your only difference with Antifa?” *Id.* at 242:25. Plaintiffs’ counsel again objected for lack of foundation. *Id.* at 243:1. The following colloquy ensued:

THE COURT: Well, [Mr. Damigo] knows what his difference with Antifa is.

MS. PHILLIPS: Well, how does he know what Antifa’s beliefs are?

THE COURT: He was sitting here today and heard the Reverend talk about Antifa. He was here all day, wasn’t he?

MS. PHILLIPS: Objection, I don’t believe Reverend Wispelwey testified at all about Antifa beliefs. In fact, Reverend Wispelwey testified he was not Antifa.

THE COURT: Well, he testified that he was not Antifa, but it’s certainly the antithesis of these defendants.

Id. at 243:1-12 (emphases added). The Court’s statements are inconsistent with Reverend Wispelwey’s testimony. Although Reverend Wispelwey did testify that he saw “antifa” during Unite the Right, he also clarified on no fewer than three separate occasions that he understood “antifa” to be a catch-all term for counter-protestors (not as a term to describe members of a violent organization). *Id.* at 68:12-16, 116:22-23, 124:9-12. And Reverend Wispelwey did not testify that he was able to visibly recognize or identify members of “antifa” at Unite the Right by their appearance, *id.* at 232:11-12; nor did he testify that “antifa” was “the antithesis of these defendants,” *id.* at 243:11-12. In fact, Reverend Wispelwey clearly testified that he does not even “know what Antifa does.” *Id.* at 128:24.

The Court Should Issue A Curative Instruction Regarding Reverend Wispelwey’s Testimony

Plaintiffs are concerned that the Court’s comments about Reverend Wispelwey’s testimony will prejudice their case and confuse the jury. We therefore request that the Court issue the curative instructive proposed by Plaintiffs. *See, e.g., United States v. Gordon*, 754 F. App’x 171, 178 (4th

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Cir. 2018) (“A key factor in determining whether curative instructions are sufficient is the temporal proximity of the instructions to the point at which the jury is exposed to inadmissible evidence.”)

* * *

For the foregoing reasons, the Court should issue Plaintiffs’ proposed curative instruction.
See Ex. A.

Respectfully submitted,



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I hereby certify that on November 11, 2021, I will serve the following by hand:

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